UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN FOUNDATION **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF LABOR, *et al.*** **Defendants.**	**No. 1:18-cv-00117 (EGS/GMH)**

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Plaintiff, Public Citizen Foundation, has sued Defendants, the Department of Labor ("DOL") and the Occupational Safety and Health Administration ("OSHA"), under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff's lawsuit arises from four FOIA requests it sent to DOL seeking work-related injury and illness data submitted to OSHA from August 2017 through January 2018 pursuant to OSHA's final rule "Improve Tracking of Workplace Injuries and Illnesses" ("ITWII"), 81 Fed. Reg. 29624-01 (May 12, 2016) (to be codified at 29 C.F.R. pts. 1902, 1904). Defendants have identified approximately 237,000 records responsive to Plaintiff's request, but they have invoked 5 U.S.C. § 552(b)(4) ("Exemption 4") to withhold those records in full, arguing that they contain confidential commercial information.

The parties initially filed cross-motions for summary judgment, disputing primarily whether Defendants had adequately invoked Exemption 4. While those motions were pending, the Supreme Court issued *Food Marketing Institute v. Argus Leader Media*, __ U.S. __, 139 S. Ct. 2356 (2019), a decision that materially affected the parties' positions with respect to the application of Exemption 4's confidentiality prong. The undersigned denied the parties' original motions

without prejudice to renewal and scheduled comprehensive briefing that would address *Food Marketing*'s impact on the records at issue. Currently pending before this Court are the parties' renewed cross-motions for summary judgment. Defendants again invoke Exemption 4 and assert that the withheld records contain confidential commercial information, while Plaintiff argues that the information in those records is neither commercial nor confidential.[1]

For the reasons stated below, Defendants have demonstrated that the withheld records contain commercial information, but they have failed to show that the information in those records is confidential for purposes of Exemption 4. They have therefore failed to show that exemption is applicable, and as a result, their renewed motion for summary judgment should be denied and Plaintiff's renewed cross-motion for summary judgment should be granted.

I. BACKGROUND

A. OSHA and the Information at Issue

Congress created OSHA to ensure the health and safety of workers by, among other things, promulgating regulations "requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries[,] and illnesses." 29 U.S.C. § 657(c)(2). Pursuant to that mission, for most industries, OSHA requires employers with more than ten employees during a calendar year ("CY") to maintain records of employees' work-related injuries and illnesses. 29 C.F.R. §§ 1904.1, 1904.2. Employers must record each injury and illness on a "Log of Work-

[1] Judge Sullivan referred this case to the undersigned for full case management. The relevant docket entries considered by the undersigned for purposes of resolving these motions are (1) the Complaint (ECF No. 1), (2) the Amended Complaint (ECF No. 12), (3) Defendants' initial motion for summary judgment (ECF No. 14) and its attachments, (4) Plaintiff's initial combined cross-motion for summary judgment and opposition to Defendants' motion for summary judgment (ECF No. 16) and its attachments, (5) Defendants' renewed motion for summary judgment (ECF No. 29) and its attachments, (6) Plaintiff's combined renewed cross-motion for summary judgment and opposition to Defendants' renewed motion for summary judgment (ECF No. 31) and its attachments, (7) Defendants' combined reply in further support of their renewed motion for summary judgment and opposition to Plaintiff's renewed cross-motion for summary judgment (ECF No. 33) and its attachment, and (8) Plaintiff's reply in further support of its renewed motion for summary judgment (ECF No. 34). The page numbers cited herein are those assigned by the Court's CM/ECF system.

Related Injuries and Illnesses"—a Form 300—and prepare a supplementary "Incident Report"—a Form 301—that provides additional details about each case recorded on the Form 300. *Id.* § 1904.29. At the end of each CY, employers must prepare a "Summary of Work-Related Injuries and Illnesses"—a Form 300A—based on the information in the Form 300. *Id.* §§ 1904.29(a), 1904.32(b).

The Form 300A—the only form at issue in this case—contains four general categories of annual workplace safety information that employers are required to provide. ECF No. 29-5 at 58. Under the heading "Number of Cases," employers must list the total number of work-related deaths, total number of work-related injuries and illnesses with days away from work, total number of work-related injuries and illnesses with job transfer or restriction, and total number of other recordable cases of work-related injuries and illnesses. *Id.* Under the heading "Number of Days," employers must record the total number of days away from work resulting from work-related injuries and illnesses and total number of days of job transfer or restriction resulting from work-related injuries and illnesses. *Id.* Under the heading "Injury and Illness Types," employers must provide the total numbers of each of the following categories of work-related injuries and illnesses: injuries, skin disorders, respiratory conditions, poisonings, hearing losses, and all other illnesses. *Id.* Employers are also required to provide establishment-related information, including the establishment's name, address, industry description, industrial classification, annual average number of employees, and total hours worked by all employees in the preceding CY. *Id.* Employers must then post the Form 300A "in a conspicuous place or places where notices to employees are customarily posted" and ensure that the form "is not altered, defaced or covered by other material." 29 C.F.R. § 1904.32(b)(5). The form must remain posted in that manner for at least three months of the year following the CY covered by the information in it. *Id.* § 1904.32(b)(6). Furthermore,

establishments must preserve their completed forms for five years, during which time the forms must be produced upon request, and at no charge, to current and former employees or their representatives. *Id.* §§ 1904.33(a), 1904.35(b)(2). Once a form is provided to a current or former employee or her representative, public dissemination of the information in it is permitted. ITWII, 81 Fed. Reg. at 29,684 ("Employees or their representatives can . . . make public most of the information [in Form 300A] . . . if they wish.").

B. ITWII

On May 12, 2016, OSHA promulgated ITWII, which requires the annual electronic submission of Forms 300A by establishments with 250 or more employees, by establishments in selected industries with 20 or more employees but fewer than 250 employees, or upon notification by OSHA. *See id.* at 29,624–25; 29 C.F.R. § 1904.41(a); ECF No. 29-2 at 3 & n.1. According to Defendants, OSHA plans to use the Form 300A data collected under ITWII "as a basis for enforcement programs that target establishments with the highest reported injury and illness rates." ECF No. 29-2 at 6.

In the notice of proposed rulemaking for ITWII, OSHA noted with respect to FOIA—and, specifically, Exemption 4—that it had determined that "[t]he information required to be submitted under [ITWII] . . . is not of a kind that would include confidential commercial information" because "employers do not view injury/illness rates as confidential," and also because the release of the information in Form 300A "does not cause competitive harm."[2] Improve Tracking of Workplace Injuries and Illnesses ("ITWII Proposed Rule"), 78 Fed. Reg. 67,254-01, 67,263 (proposed

[2] At the time of the notice of proposed rulemaking for ITWII, the standard for whether information involuntarily submitted to the government—as is the case for records collected under ITWII—would be deemed confidential for purposes of Exemption 4 turned on whether the disclosure of the information would likely "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), *abrogated by Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2364–66.

Nov. 8, 2013) (to be codified at 29 C.F.R. pts. 1904, 1952). However, OSHA invited "[m]embers of the public . . . to express their views on this issue during the comment period." *Id.* at 67,263.

During the comment period, some commenters raised concerns with respect to the government releasing the Form 300A data in response to FOIA requests, claiming that portions of the data might be exempt from disclosure under Exemption 4 because they contain confidential commercial information. *See* ITWII, 81 Fed. Reg. at 29,633, 29,657–58; ECF No. 29-1 at 24; *see also, e.g.*, *id.* at 26 (quoting a comment stating that the information in Form 300A is confidential because it "highlight[s] the state of a business at any given time," and because "employers could compare their injury rates and hazards at their establishments to those at comparable establishments" (quoting ECF No. 29-7 at 163)); ECF No. 29-1 at 26–27 ("Many businesses consider employee head count and hours worked to be proprietary information. This information could be used to determine business processes as well as company approaches to operations and security." (quoting ECF No. 29-7 at 189)); ECF No. 29-1 at 28 n.7 (quoting comments from four trade groups asserting that each group's members "believe" or "consider" total employee hours worked to be confidential); ECF No. 29-1 at 28 ("'[A]n employer's rate of accidents, hours worked, and number of employees are all factors that influence general liability insurance costs,' and [ ] '[p]roviding a competitor with information that could help assess a firm's insurance costs could be the difference between winning and losing a bid.'" (some alterations omitted) (third alteration in original) (quoting ECF No. 29-7 at 5)). Others disagreed, noting that releasing the Form 300A data in full "would allow employers, employees, researchers, unions, safety and health professionals, and the public to improve workplace safety and health." ITWII, 81 Fed. Reg. at 29,633; *see also id.* at 29,660. After reviewing those comments, OSHA "agree[d] with commenters who stated that [the Form 300A] data generally do not include proprietary or commercial business information." *Id.*

at 29,660. More, OSHA "emphasize[d]" that it would publicly "post injury and illness record-keeping information collected by [ITWII]" and that "[t]he purpose for the publication of record-keeping data under this final rule is to disseminate information about occupational injuries and illnesses." *Id.* at 29,659–60; *see also id.* at 29,624 (stating that "OSHA intends to post the data from the[ ] submissions [of Forms 300A] on a publicly accessible Web site").

The first set of Form 300A data that OSHA collected under ITWII was for CY 2016, which employers were required to submit by December 15, 2017, but which OSHA continued to accept through December 31, 2017. ECF No. 29-2 at 5. From an estimated 350,000 covered establishments for which employers were obligated to submit data, OSHA received only about 163,000 responsive records—a response rate of around 47 percent. *Id.* The second set of data was from CY 2017, which employers were required to submit by July 1, 2018. *Id.* at 5–6. Out of approximately 463,000 covered establishments, OSHA received only about 198,000 responsive records—a response rate of around 43 percent. *Id.* at 6. Employers were required to submit data from CY 2018—the last CY for which Defendants have provided information to this Court—by March 2, 2019. *Id.* OSHA received only about 220,000 responsive records from an estimated 463,000 covered establishments—a response rate of around 48 percent. *Id.* Defendants assert that "the low response rates associated with the CY 2016, CY 2017, and CY 2018 data are due, at least in part, to the perception by some employers that OSHA would immediately make their submissions public and thereby eviscerate the employers' treatment of the data as private." ECF No. 29-6 at 11, ¶ 36. However, in a proposed amendment to ITWII issued on July 30, 2018, OSHA attributed the low CY 2016 rate to a lack of notice to employers, claiming that it had "discovered that employers did not receive clear notice of their obligation to respond for [CY] 2016" and that it therefore "expect[ed] many more establishments to respond with [CY] 2017 summary data." Tracking

of Workplace Injuries and Illnesses ("ITWII Proposed Amendment"), 83 Fed. Reg. 36,494-01, 36,498 n.3 (proposed July 30, 2018) (to be codified at 29 C.F.R. pt. 1904).

Defendants contend that, "at least since November 2017, OSHA has taken the position that the Form 300A data should be kept private." ECF No. 29-1 at 38–39. According to Defendants, OSHA has treated the information in Form 300A as private by (1) withholding the information in response to FOIA and non-FOIA requests; (2) invoking Exemption 4 in another FOIA litigation in the Northern District of California in which the plaintiff sought, among other things, Form 300A data submitted to OSHA under ITWII (*Ctr. for Investigative Reporting v. DOL*, No. 4:18-cv-02414, 2020 WL 2995209, at *1–2 (N.D. Cal. June 4, 2020) [hereinafter *CIR*])[3]; and (3) posting on its website on August 23, 2019, that it "views the [Form] 300A data as confidential commercial information," which it "will not release [ ] to the public." ECF No. 29-1 at 38–40 (quoting *OSHA Injury and Illness Recordkeeping and Reporting Requirements* (OSHA), http://www.osha.gov/recordkeeping/index.html).

C. Plaintiff's FOIA Requests and the Instant Proceedings

Between October 2017 and January 2018, Plaintiff submitted three FOIA requests to DOL. *See* ECF No. 29-2 at 7–11. Collectively, those requests sought all records—including, but not limited to, data from Forms 300, 300A, and 301—submitted to OSHA pursuant to ITWII from August 1, 2017, through December 18, 2017. *See id.*

In response to Plaintiff's first and second requests, DOL invoked 5 U.S.C. § 552(b)(7)(E) ("Exemption 7(E)")—under which an agency may withhold information if its disclosure would reveal "techniques and procedures for law enforcement investigations or prosecutions, or would

[3] In *CIR*, the parties filed cross-motions for summary judgment, disputing whether the information in Form 300A—among other forms at issue in that case—is commercial and confidential under Exemption 4. 2020 WL 2995209, at *2. On June 4, 2020, the district court granted the plaintiff's motion in part and denied the defendant's motion because it determined that the information in Form 300A is not confidential. *Id*. at *4–5.

disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law"—to withhold all responsive records. ECF No. 29-2 at 9–11. After DOL initially failed to respond to Plaintiff's third request, Plaintiff filed this lawsuit on January 19, 2018, to compel production of the Form 300A data that it sought in its first, second, and third requests. *See* ECF No. 1 at 1–6.

On February 1, 2018, Plaintiff submitted a fourth and final FOIA request to DOL, seeking Form 300, 300A, and 301 data submitted to OSHA pursuant to ITWII from December 19, 2017, through January 31, 2018.[4] ECF No. 29-2 at 12–13. On February 20, 2018, DOL responded to Plaintiff's third and fourth requests; however, that response effectively served as a collective response to all four of Plaintiff's requests. ECF No. 29-2 at 13 & n.4; *see* ECF No. 29-5 at 46–47. DOL stated that OSHA did not have any records pertaining to Forms 300 or 301 because OSHA was "not collecting that information at [that] time."[5] ECF No. 29-5 at 46. DOL further noted that it had identified approximately 237,000 records containing Form 300A data submitted to OSHA during the period covered by Plaintiff's four requests (*i.e.*, from August 2017 through January 2018). *Id.*; ECF No. 29-2 at 13 & n.4. However, as with Plaintiff's first and second requests, DOL again invoked Exemption 7(E) to withhold all responsive records. ECF No. 29-5 at 46–47. Notably, DOL did not state that it was invoking Exemption 4 or any other FOIA exemption. *See id.*

A week later, Plaintiff administratively appealed DOL's decision to withhold the Form 300A data under Exemption 7(E). ECF No. 29-5 at 50. Plaintiff did not, however, contest DOL's determination that it possessed no data pertaining to Forms 300 and 301, nor did it raise

[4] Collectively, then, Plaintiff's four requests—all of which are at issue here—seek all Form 300, 300A, and 301 data submitted to OSHA pursuant to ITWII from August 1, 2017, through January 31, 2018.

[5] Notably, "[i]n May 2018, OSHA announced that it was not accepting Forms 300 and 301, and subsequently issued a notice of proposed rulemaking to rescind the electronic filing requirements for those forms." *CIR*, 2020 WL 2995209, at *2 n.1.

any issues as to the adequacy of DOL's search for responsive records. *See id.* at 50–56. DOL did not respond to the appeal. ECF No. 31 at 16. Accordingly, on April 16, 2018, Plaintiff filed an amended complaint with this Court to compel production of the approximately 237,000 records of Form 300A data that DOL withheld in response to all four of Plaintiff's FOIA requests. *See* ECF No. 12 at 3–7.

On June 1, 2018, Defendants filed an initial motion for summary judgment. ECF No. 14. In that motion, Defendants stated that they would not be invoking Exemption 7(E) to withhold the Form 300A data, noting that they had "determined that the proper [FOIA] [e]xemption to apply is Exemption 4." ECF No. 14-1 at 8 n.1. Pursuant to that determination, they contended that the Form 300A data contain confidential commercial information "obtained from a person," as required by Exemption 4. *See* ECF No. 14-1 at 16–29. With respect to Exemption 4's confidentiality prong, Defendants relied on *National Parks* to argue that the requested records are confidential. *See* ECF No. 14-1 at 18–29. Defendants also asserted that they conducted an adequate search for records responsive to Plaintiff's FOIA requests and that they complied with FOIA's segregability requirement under 5 U.S.C. § 552(b). ECF No. 14-1 at 12–14.

On June 29, 2018, Plaintiff filed an initial cross-motion for summary judgment. ECF No. 15. Plaintiff did not dispute that the withheld records were "obtained from a person," nor did it contest the adequacy of Defendants' search for responsive records. ECF No. 16 at 27 n.5; *see generally id.* Rather, it contended that the Form 300A data contain neither commercial nor confidential information. *See id.* at 27–41. With respect to Exemption 4's confidentiality prong, Plaintiff also relied on *National Parks* to argue that the requested information is not confidential. *See* ECF No. 16 at 29–34. More, Plaintiff claimed that, even if some portions of the information were exempt, Defendants failed to comply with FOIA's segregability requirement. *Id.* at 42–43.

The parties' first round of cross-motions for summary judgment was fully briefed by September 5, 2018. ECF No. 20. While those motions were pending, the Supreme Court issued *Food Marketing*, which abrogated *National Parks*. *Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2364–65. In light of the parties' extensive reliance on *National Parks* in their initial motions, the undersigned denied those motions without prejudice and issued a new briefing schedule for renewed motions for summary judgment that would address the impact of *Food Marketing* on the parties' arguments regarding Exemption 4's confidentiality prong. ECF No. 27 at 1–3.

On November 26, 2019, Defendants filed a renewed motion for summary judgment. ECF No. 29. In support of that motion, Defendants again invoke Exemption 4 and argue that the withheld records contain confidential commercial information. *See* ECF No. 29-1 at 19–40. Specifically, Defendants contend that the information is confidential per *Food Marketing* because the establishments that have submitted Form 300A data to OSHA under ITWII customarily keep such data private or closely held. *See id.* at 22–35. Defendants also claim, as they did in their initial motion for summary judgment, that they conducted an adequate search for responsive records and that they complied with FOIA's segregability requirement. *See id.* at 16–19.

On December 9, 2019, Plaintiff filed a renewed cross-motion for summary judgment. ECF No. 30. Once more, Plaintiff does not dispute that the records at issue were "obtained from a person" or that Defendants have conducted an adequate search for responsive records. *See* ECF No. 31 at 18; *see generally id.* However, Plaintiff argues that (1) the information in the withheld records is noncommercial; (2) Defendants have failed to show that the information is confidential under *Food Marketing*; (3) the information is in fact not confidential; (4) Defendants have failed to comply with the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, 539, 5 U.S.C. § 552; and (5) even if they have properly invoked Exemption 4 and complied with the

FOIA Improvement Act, Defendants have failed to comply with FOIA's segregability requirement. *See* ECF No. 31 at 19–39.

The parties' motions are fully briefed and ripe for adjudication.

II. LEGAL STANDARDS

A. FOIA

FOIA presumes that an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It was enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," and it favors "full agency disclosure." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting *Rose v. Dep't of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). "After an agency receives a [FOIA] request that 'reasonably describes' records being sought, the agency must 'conduct[ ] a search reasonably calculated to uncover all relevant documents.'" *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115, 131 (D.D.C. 2017) (second alteration in original) (citations omitted) (first quoting 5 U.S.C. § 552(a)(3)(A), then quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). The agency must then release all responsive records to the requester unless it demonstrates that one of FOIA's nine exemptions to disclosure applies. *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). "To carry that burden, the agency 'must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *100Reporters*, 248 F. Supp. 3d at 135 (quoting *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

B. Summary Judgment

FOIA cases are usually resolved on motions for summary judgment. *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011). "If an agency's affidavit describes the justifications for withholding the information [under a FOIA exemption] with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011). In short, an agency may be awarded summary judgment if its justification for invoking a FOIA exemption "appears 'logical' or 'plausible.'" *Davidson v. DOD*, 206 F. Supp. 3d 178, 189 (D.D.C. 2016) (quoting *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)).

III. DISCUSSION

Exemption 4 permits an agency to withhold records containing "trade secrets" or "commercial or financial information [that is] obtained from a person and [is] privileged or confidential." 5 U.S.C. § 552(b)(4). "If the documents are not trade secrets," as is the case here, "an agency must establish that the withheld records are '(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.'" *Pub. Citizen v. HHS*, 975 F. Supp. 2d 81, 98 (D.D.C. 2013) (quoting *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). Plaintiff does not dispute that the records at issue were "obtained from a person," and Defendants do not contend that the records are privileged. ECF No. 29-1 at 19 n.3; *id.* 23 n.16; at ECF No. 30 at 18. Accordingly, the undersigned will consider only whether the records at issue contain confidential commercial information.[6]

[6] Although in their memorandum in support of their renewed motion for summary judgment, Defendants sometimes use the phrase "commercial or financial" to describe the information at issue—thereby seemingly conflating those terms—their arguments concern only commerciality. *See* ECF No. 29-1 at 19–22; *see also* ECF No. 32 at 2–6. Because "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do

As explained below, Defendants have met Exemption 4's "threshold requirement[ ]" of showing that the records contain commercial information. *Ctr. for Pub. Integrity v. U.S. Dep't of Energy*, 234 F. Supp. 3d 65, 74 (D.D.C. 2017) (citing *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). However, they have not demonstrated that the information is confidential under that exemption. Accordingly, this Court should deny Defendants' renewed motion for summary judgment and grant Plaintiff's renewed cross-motion for summary judgment.

A. Commercial Information

Plaintiff contends that the information in Form 300A is noncommercial because it "neither serves a commercial function nor is of a commercial nature," noting that the information "sheds no light on the product or service offered by the submitter, how the product or service offered is generated, or the costs or revenues of the product or service." ECF No. 31 at 20. However, "Exemption 4 is *not* confined only to records that 'reveal basic commercial operations . . . or relate to the income-producing aspects of a business.'" *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (alteration in original) (quoting *Pub. Citizen Health Research Grp.*, 704 F.2d at 1290). Rather, Exemption 4 extends "broadly" to information regarding "any type of activity bearing on commerce," *Pub. Citizen*, 975 F. Supp. 2d at 101, and it "applies (among other situations) when the provider of the information has a commercial interest in the information," *Baker & Hostetler*, 473 F.3d at 319 (citing *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 38–39 (D.C. Cir. 2002)).

Here, the undersigned easily finds that the Form 300A data relate to "activity bearing on commerce." *See Pub. Citizen*, 975 F. Supp. 2d at 101. Information about a business's "number

counsel's work," Defendants may be deemed to have forfeit the argument that the information is financial for purposes of Exemption 4. *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 95 (D.D.C. 2019) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005)). In any event, because Defendants have demonstrated that the information is commercial, this Court need not consider whether it is also financial.

of employees and employee work-hours" directly pertains to that business's "labor costs and productivity." *OSHA Data/CIH, Inc. v. DOL*, 220 F.3d 153, 166–67 (3d Cir. 2000); *see also Plumbers and Gasfitters Local Union No. 1 v. U.S. Dep't of the Interior*, No. 10–cv–4882 (CBA), 2011 WL 5117577, at *2 (E.D.N.Y. Oct. 26, 2011) (noting that "[l]ittle more than common sense establishes that the number of hours an employee works is commercial"). Likewise, work-related injury and illness data concern a business's "productivity, hours worked, . . . and production." *OSHA Data*, 220 F.3d 153, 157, 166 (quoting *OSHA Data/CIH, Inc. v. DOL*, 105 F. Supp. 2d 359, 365 n.7 (D.N.J. 1999)). More, Defendants have submitted comments from employer and trade-group representatives showing that employers have a commercial interest in the information in Form 300A. *See, e.g.*, ECF No. 29-1 at 26 (quoting a comment stating that the information in Form 300A "highlight[s] the state of a business at any given time" (quoting ECF No. 29-7 at 163)); ECF No. 29-1 at 26–27 ("[E]mployee head count and hours worked . . . [is] information . . . [that relates to] business processes as well as company approaches to operations and security." (quoting ECF No. 29-7 at 189)); ECF No. 29-1 at 28 ("An employer's rate of accidents, hours worked, and number of employees are all factors that influence general liability insurance costs . . . ." (alteration omitted) (quoting ECF No. 29-7 at 5)).

Nevertheless, Plaintiff contends that the information in Form 300A is noncommercial because employers submit it to meet regulatory requirements, and not to fulfill any commercial purpose. ECF No. 31 at 20. But "[i]nformation may be deemed commercial" under Exemption 4 "even if the provider's [ ] interest in gathering, processing, and reporting the information is non-commercial." *Elec. Privacy Info. Ctr. v. DHS*, 117 F. Supp. 3d 46, 62 (D.D.C. 2015) (alteration in original) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 278,

281 (D.C. Cir. 1987), *vacated on other grounds*, 975 F.2d 871 (D.C. Cir. 1992) (en banc)). Hence, Plaintiff's argument fails.

Plaintiff's remaining argument—that the information in Form 300A lacks a sufficiently direct connection to commercial activity to be deemed commercial—is likewise unavailing. Plaintiff first cites a case from the Northern District of Illinois in which the court held that information regarding the nature and frequency of commercial airlines' in-flight medical emergencies is non-commercial information. *See* ECF No. 31 at 20–21 (citing *Chi. Tribune Co. v. FAA*, No. 97 C 2363, 1998 WL 242611 (N.D. Ill. May 7, 1998)). In that case, however, the information was deemed noncommercial because "[t]he medical emergencies detailed in the documents [did] not naturally flow from commercial flight operations, but rather [were] chance events which happened to occur while the airplanes were in flight." *Chi. Tribune*, 1998 WL 242611, at *2. Here, by contrast, the work-related injury and illness information in Form 300A "naturally flow[s]" from an establishment's commercial operations and does not describe mere "chance events which happened to occur" in the course of those operations. *Id.* at *2. More, unlike the information at issue in *Chicago Tribune*, the information in Form 300A—in addition to containing work-related injury and illness data—includes the annual average number of employees and total number of hours worked by all employees in a CY (ECF No. 29-5 at 58)—which, as noted previously, is plainly commercial.

Plaintiff's reliance on *Center for Investigative Reporting v. DOL*, 424 F. Supp. 3d 771 (N.D. Cal. 2019), is also misplaced. *See* ECF No. 34 at 6–7. There, the court held that employers' demographic reports containing data regarding their employees' gender, race/ethnicity, and job category were noncommercial for purposes of Exemption 4. *Investigative Reporting*, 424 F. Supp. 3d at 774, 777–79. Unlike the information in those reports, however, Form 300A includes work-

related injury and illness data, as well as data listing the annual average number of employees and total hours worked by all employees in a CY (ECF No. 29-5 at 58), that clearly have a closer connection to an establishment's commercial operations than generalized, companywide demographic statistics.

In sum, Defendants have met their burden to show that the information in Form 300A is commercial.

B. Confidential Information

Having found that Defendants have shown the information in the withheld records is commercial, the undersigned turns to whether Defendants have demonstrated that the information is confidential for purposes of Exemption 4.

1. Customarily Kept Private or Closely Held

In *Food Marketing*, the Supreme Court held that, to be considered confidential under Exemption 4, information must be "customarily kept private, or at least closely held, by the person imparting it." __ U.S. at __, 139 S. Ct. at 2363; *see also id.* at 2366 (finding that information is confidential under Exemption 4 when it is "customarily and actually treated as private by its owner"). In so doing, the Court abrogated *National Parks*, in which the D.C. Circuit held that information is confidential if its disclosure would likely "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." 498 F.2d at 770; *Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2364–65. However, the Court favorably cited *Critical Mass*, where the D.C. Circuit stated that, when information is voluntarily submitted to the government, it is confidential if it is "of a kind that would customarily not be released to the public by the person from whom it was obtained." 975 F.2d at 879; *Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2365 (stating that, in *Critical*

Mass, the D.C. Circuit "adhered to a much more traditional understanding of the statutory term 'confidential'"). Thus, as another court in this District has held, "*Critical Mass* and its progeny now supply the framework in this Circuit for determining whether voluntarily submitted *and* involuntarily submitted commercial . . . information [is] 'confidential' under Exemption 4." *Ctr. for Investigative Reporting v. U.S. Customs and Border Prot.*, __ F. Supp. 3d __, __, 2019 WL 7372663, at *11 (D.D.C. 2019) [hereinafter *CBP*].

Defendants claim that "the data sought by Plaintiff contain commercially sensitive information that is treated as private by the submitting employers in the ordinary course of business," and that it is "customarily not released to the public by [those] employers." ECF No. 29-1 at 23. To support those contentions, Defendants cite employer and trade-group representatives' statements asserting that employers consider the information in Form 300A confidential—and, in some cases, explaining why they hold this belief. *See, e.g.*, ECF No. 29-1 at 26 (quoting a comment stating that the information in Form 300A is confidential because it "highlight[s] the state of a business at any given time," as "employers could compare their injury rates and hazards at their establishments to those at comparable establishments" (quoting ECF No. 29-7 at 163)); ECF No. 29-1 at 26–27 ("Many businesses consider employee head count and hours worked to be proprietary information. This information could be used to determine business processes as well as company approaches to operations and security." (quoting ECF No. 29-7 at 189)); ECF No. 29-1 at 28 n.7 (quoting comments from four separate trade groups stating that each group's members "believe" or "consider" total employee hours worked to be confidential); ECF No. 29-1 at 28 ("'An employer's rate of accidents, hours worked, and number of employees are all factors that influence general liability insurance costs,' and [ ] '[p]roviding a competitor with information that could help

assess a firm's insurance costs could be the difference between winning and losing a bid.'" (some alterations omitted) (second alteration in original) (quoting ECF No. 29-7 at 5)).

However, "*Food Marketing* makes clear [that] the court must examine whether the information [at issue] actually is kept and treated as confidential, not whether the submitter considers it to be so." *CIR*, 2020 WL 2995209, at *4 (citing *Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2363). Thus, to demonstrate the confidentiality of the information in Form 300A, Defendants must show that employers took steps to establish and maintain its privacy. For example, in *Food Marketing*, the Court found that the government had shown the information at issue was confidential because the submitters of that information represented that they "customarily [did] not disclose" it or "make it publicly available 'in any way,'" and because "[e]ven within a company . . . only small groups of employees usually ha[d] access to it." __ U.S. at __, 139 S. Ct. at 2363. Similarly, in *American Small Business League v. DOD*, a court in the Northern District of California determined that the government had met *Food Marketing*'s standard for confidentiality where the submitters of the information at issue averred that, to establish and maintain the privacy of the information, they used, among other things, confidentiality agreements, restrictive markings on documents and communications, and password-protected networks. 411 F. Supp. 3d 824, 831 (N.D. Cal. 2019). Furthermore, courts in this District interpreting *Critical Mass*'s confidentiality standard—which, as noted previously, "now suppl[ies] the framework in this Circuit for determining whether . . . information [is] 'confidential' under Exemption 4," *CBP*, __ F. Supp. 3d at __, 2019 WL 7372663, at *11—routinely deem information to be "of a kind that would customarily not be released to the public by the person from whom it was obtained," *Critical Mass*, 975 F.2d at 879, when the owners of the information adduced the steps they took to establish and maintain its privacy. *See, e.g.*, *Judicial Watch v. U.S. Dep't of Treasury*, 802 F. Supp. 2d 185, 205 (D.D.C. 2011) (finding that

the defendant showed that a document was confidential under *Critical Mass* where the submitter had indicated on a cover email that the document "contained confidential information and was not to be disseminated, distributed[,] or copied"); *Parker v. Bureau of Land Mgmt.*, 141 F. Supp. 2d 71, 79 (D.D.C. 2001) (same where the government proffered that the information at issue was "governed by confidentiality agreements" and distribution within the company that submitted it "was on a limited 'need to know' basis to prevent public dissemination"); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 18 (D.D.C. 2000) (same where the government asserted that disclosure of the information was "always accompanied by a confidentiality agreement or protective order").

By contrast, in *CIR*, a court in the Northern District of California held that the government failed to show that the same information at issue in this case—Form 300A data—was confidential because the defendant relied on the same comments cited here, which merely "reflect[ed] the owners' subjective view of the nature of the information." 2020 WL 2995209, at *4. Similarly, in *CBP*, a court in this District found that the defendants failed to show the information at issue in that case was confidential per *Food Marketing* in part because the defendants' declaration that "the submitters have a strong interest in maintaining confidential treatment for their information" was "at best ambiguous as to whether it in fact refer[red] to the practices of [those] submitters." *CBP*, __ F. Supp. 3d at __, 2019 WL 7372663, at *13 (internal quotation marks and emphasis omitted).

Here, as in *CIR*, the comments that Defendants have cited show that some employers consider the information in Form 300A confidential—and, in some cases, the comments explain why those employers hold that belief—but they "do not speak to how the owners keep and treat the Form 300A information." *CIR*, 2020 WL 2995209, at *4. As such, they are "at best ambiguous as to whether [they] in fact refer to the practices of [the] submitters" of the Forms 300A in

connection with the information included on those forms. *CBP*, __ F. Supp. 3d at __, 2019 WL 7372663, at *13. And while one could, based on those comments, speculate about whether and how the submitters keep the information in Form 300A private or closely held, "[s]uch speculation is not the Court's job." *Pub. Citizen*, 975 F. Supp. 2d at 104 (citing *Coastal Gates Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 870 (D.C. Cir. 1980) ("The courts will not speculate as to whether [an] [e]xemption [ ] might, under some possible congruence of circumstances not proven or even asserted be properly applied to [the withheld records] . . . , nor will [they] assume that all the necessary conditions are met merely because the agency invokes an exemption.")).

Defendants attempt to bolster the comments by citing low ITWII response rates over the three-year period following the regulation's promulgation, arguing that "the low response rates associated with the CY 2016, CY 2017, and CY 2018 data are due, at least in part, to the perception by some employers that OSHA would immediately make their submissions public and thereby eviscerate the employers' treatment of the data as private." ECF No. 29-1 at 30. While that may be true, the ITWII response rates reveal nothing about the practices of the employers of a substantial number of establishments—163,000 for CY 2016, 198,000 for CY 2017, and 220,000 for CY 2018 (*id.*)—that did in fact submit the Forms 300A at issue. Furthermore, the connection between low ITWII response rates and a desire to maintain privacy remains speculative, as there are other plausible reasons for the low response rates. For example, OSHA itself has attributed the low CY 2016 rate to a lack of notice to employers, claiming that it had "discovered that employers did not receive clear notice of their obligation to respond for 2016" and that it therefore "expect[ed] many more establishments to respond with 2017 summary data." *See* ITWII Proposed Amendment, 83 Fed. Reg. at 36,498 n.3.

Defendants' reliance on the comments is also problematic in light of other evidence indicating that employers have neither viewed nor treated the information in Form 300A as private. For example, in the notice of proposed rulemaking for ITWII, OSHA noted with respect to FOIA—and, specifically, Exemption 4—that it had determined that the information in Form 300A was not confidential in part because "employers do not view injury/illness rates as confidential." ITWII Proposed Rule, 78 Fed. Reg. at 67,263. Similarly, in 2004, a court in the Southern District of New York held that the information in Form 300A was not confidential partly because "the vast majority of employers" did not view most of that information as confidential. *N.Y. Times Co. v. DOL*, 340 F. Supp. 2d 394, 401–03 (S.D.N.Y. 2004). More, OSHA requires employers to post Forms 300A in a "conspicuous place" in the workplace for at least three months and to preserve them for five years. 29 C.F.R. § 1904.32(b)(5). During that time, employers must produce the forms upon request and at no charge to employees, former employees, or their representatives, who may in turn publicly disseminate the information in the forms. *Id.* §§ 1904.33, 1904.35(b)(2); ITWII, 81 Fed. Reg. at 29,684. The undersigned expresses no view as to whether this evidence renders the information in Form 300A public; however, at the very least, it further undermines Defendants' showing of confidentiality because it calls into question how employers have actually viewed and treated the information in Form 300A. *Cf. CIR*, 2020 WL 2995209, at *4 (finding that Form 300A information is not confidential under Exemption 4 in part because "the Form 300A information is both readily observable by and shared with employees, who have the right to make the information public").

In sum, because Defendants have failed to show that the Form 300A information is customarily kept private or closely held, they have not satisfied *Food Marketing*'s minimum requirement for demonstrating confidentiality. __ U.S. at __, 139 S. Ct. at 2363. Thus, they have failed

adequately to invoke Exemption 4. *See Pub. Citizen*, 975 F. Supp. 2d at 98 (noting that, to invoke Exemption 4 successfully, the government bears the burden of demonstrating that the information at issue is confidential).

2. Assurance of Privacy

In *Food Marketing*, the Supreme Court suggested that, in addition to requiring that the information at issue be customarily kept private or closely held, the party receiving that information must have "provide[d] some assurance that it [would] remain secret" in order for it to be deemed confidential under Exemption 4. __ U.S. at __, 139 S. Ct. at 2363. Thus, the Court left open the possibility that "privately held information [could] lose its confidential character for purposes of Exemption 4 if it's communicated to the government without assurances that the government will keep it private." *Id.* (emphasis omitted). "The [ ] Court stopped short, however, of deciding that Exemption 4 does in fact impose this second requirement." *CBP*, __ F. Supp. 3d at __, 2019 WL 7372663, at *13 (citing *Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2363).

Given that Defendants have failed to meet the minimum standard articulated in *Food Marketing* of showing that the Form 300A information is customarily kept private or closely held, "'there's no need to resolve' whether Exemption 4 . . . imposes an 'assurance of privacy' requirement." *CBP*, __ F. Supp. 3d at __, 2019 WL 7372663, at *14 (quoting *Food Mktg.*, __ U.S. at __, 139 S. Ct. at 2363). In any event, "[a]ssuming without deciding that the 'assurance of privacy' requirement applies here," *Am. Small Bus. League*, 411 F. Supp. 3d at 833, Defendants have not met it, as they concede that they provided no assurance of privacy to the submitters of the information in Form 300A for any CY. *See* ECF No. 29-1 at 37 (asserting that "the prevailing legal paradigm" at the time of any of the Form 300A submissions "would not have allowed [OSHA] reasonably to provide [ ] an assurance [of privacy to the submitters]").

Defendants attempt to overcome this deficiency by arguing that, at least since November 2017, OSHA has taken the position that the Form 300A data should be kept private by (1) withholding the information in response to FOIA and non-FOIA requests; (2) invoking Exemption 4 in another FOIA litigation—*i.e.*, *CIR*; and (3) posting on its website on August 23, 2019, that OSHA "views the [Form] 300A data as confidential commercial information," which it "will not release [ ] to the public." ECF No. 29-1 at 38–40 (quoting *OSHA Injury and Illness Recordkeeping and Reporting Requirements* (OSHA), http://www.osha.gov/recordkeeping/index.html). However, "even if OSHA had changed its position internally as of November 2017, it did not make public statements about that change until June 2018"—*i.e.*, when OSHA first invoked Exemption 4 in this litigation—which is four months after the period relevant to Plaintiff's FOIA requests (August 2017 to February 2018). *CIR*, 2020 WL 2995209, at *5. Defendants have therefore provided no evidence that, during the time relevant to Plaintiff's requests, employers had any knowledge that OSHA would view or treat the Form 300A information they submitted as private. *Cf. id.* (finding that DOL failed to satisfy *Food Marketing*'s potential "assurance of privacy" requirement in part because OSHA made no public statements about its change in position during the period relevant to the plaintiff's FOIA request); *see also CBP*, __ F. Supp. 3d at __, 2019 WL 7372663, *14 (same where the government provided no evidence that the submitters of the information at issue understood, during the period relevant to the plaintiff's FOIA request, that certain provisions of federal law governing confidentiality applied to the information). In fact, the record, if anything, indicates that, at least between August 2017 and February 2018, employers understood that OSHA would publicize the Form 300A information they submitted to it, since "OSHA [had] expressly stated in rulemaking in 2016 that it would 'post the data' from the electronic submissions of Forms

. . . 300A 'on a publicly accessible Web Site.'" *CIR*, 2020 WL 2995209, at *5 (quoting ITWII, 81 Fed. Reg. at 29,624). Thus, Defendants' argument is unavailing.

In sum, Defendants have failed to meet the necessary—or even potentially necessary—elements for demonstrating Exemption 4 confidentiality per *Food Marketing*, and thus they have failed adequately to invoke Exemption 4.[7]

IV. CONCLUSION

Because Defendants have failed adequately to invoke Exemption 4 with respect to the records that Plaintiff seeks, the undersigned **RECOMMENDS** that Defendants' renewed motion for summary judgment (ECF No. 29) be **DENIED** and that Plaintiff's renewed cross-motion for summary judgment (ECF No. 30) be **GRANTED**.

* * * * *

The parties are hereby advised that, under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985).

[7] Because Defendants have failed to invoke Exemption 4 successfully, this Court need not consider whether they have complied with the FOIA Improvement Act or with FOIA's segregability requirement. *See CBP*, 2019 WL 7372663, at *14 ("The defendants have not established that the withheld information falls within the scope of Exemption 4 in the first instance. Thus, they have, *a fortiori*, failed to satisfy the [FOIA Improvement Act] . . . ."); 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . .").

Date: June 23, 2020

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G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE